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REPUTATION WITH RESPECT TO BOOKS OF ORIGINAL ENTRIES

Books of original entries are made by somebody. The assertions therein of sales made, or services rendered, are the assertions of those who keep them. They may be true or untrue; accurate or inaccurate. While the law allows these entries to be used as evidence that the things occurred which are mentioned in them, e. g., the sales were made to such and such persons of such and such articles at such and such prices, it remembers that they are self-serving statements, made in the absence of the persons to be charged, not made under oath, or subject to cross-examination. Gibson, J., said, (and his dictum has been often quoted), "Books of original entries are at best a dangerous kind of evidence. They are admissible on grounds of necessity, not of convenience; and the decisions in their favor have always gone as far as expediency can require, or prudence justify. Such books are barely competent, and although they often afford perfectly satisfactory evidence, yet, being the act of the party using them, and affording extraordinary facilities to the practice of deception in a way that renders detection difficult, they are entitled to no

peculiar protection, but are liable to have their credibility impeached by every means in the power of the opposite party."[1]

Reputation of the Entrant

Since the written entry is the assertion of somebody and is used testimonially, the same infirmative evidence is admissible, as in the case of testimony. The reputation of the writer for inveracity, may be given in evidence. This is true, whether the person who made the entries in the book has appeared as a witness[2] in support of them, or whether, being dead or out of the state[3] his handwriting as clerk is proved.

Honesty and Veracity

A curious discrimination was made, in Crouse v. Miller[4] between the admissibleness of proof in respect to honesty, and proof in respect to veracity. The book-keeper was not in court, and another testified that the entries had been made by him. The opposite party was allowed to ask, ever the objection of the proponent, what the character of the book-keeper generally was, for honesty. It was urged that the question should have been only as to veracity. Gibson, J., concedes that if he had been a witness, to support the books, "his oath might have been impeached on the ground of veracity; but I will not say that the *books* might not also be impeached on the ground of want of honesty. Here however, the books were not at-

[1]Crouse v. Miller, 10 S. & R. 155.

[2]White's Estate, 11 Phila. 100; Funk v. Ely, 45 Pa. 444.

[3]Crouse v. Miller, 10 S. & R. 155.

[4]10 S. & R. 155. In Weamer v. Juart, 29 Pa. 257, a reputation for honesty and correct book-keeping, was said to be pertinent, because the book-keeper was not a witness, as distinguished from truth and veracity. It would have been error to prove reputation for truth and veracity.

tested by his oath, but by evidence of his hand-writing; and deriving all their claim to respect from his character, whatever affected the one, very fairly had a direct tendency to affect the other." The *book* is simply the utterance of the *man*. If the man is unveracious, so are probably his written assertions in the book. If the man is dishonest, he has probably resorted to fictitious charges in order to compel the party charged to pay for what he has not got; or to pay more for what he has got, than he contracted to pay. The distinction between the man and the book which is simply the utterances of the man is impalpable.

Honesty is, possibly, freedom from a fraudulent disposition. Deception is not necessarily fraud. Some deception is innocent; some, though reprehensible, does not constitute fraud. However, fraud is often perpetrated by falsehood. The only way in which a statement in a book could be dishonest, would be by being false, and by falsely asserting a debt on the part of the person charged. The reputation of the keeper of the book for dishonesty and for unveracity, would be equally pertinent. Hanna, J., sensibly observes "that a party who seeks to prove his claim by his books of original entries, not only offers for attack and scrutiny his character for honesty, truth and veracity." A consciously untrue charge in a book, is a dishonest charge. It defrauds either the merchant, physician, laborer, who conducts the business in which the book is kept, or the person who is named in it as purchaser, patient, employer. In an action of debt, on a book account, the plaintiff swore that his books were books of original entries. It was proper to receive proof that he was unworthy of credit on his oath. In so far as he swore that the books were his books of original entries, his oath was probably unquestionable. What was unworthy of

credit was not this statement, but the accuracy of the entries, or his statement that they were accurate.[5]

Reputation for Keeping Inaccurate Books

In Weaver v. Juart[6] evidence was offered of the bad reputation of the books in the neighborhood, among those who dealt with the firm, whose books they were, and of the reputation of the partner, now deceased, who kept the books, for keeping inaccurate books. It might be suspected from the remarks of Woodward, J., that it would have been error to give evidence of the "general character" of the book-keeper, "for truth and veracity." It was proper to give evidence of general character for honesty and correct book-keeping. But incorrect book-keeping is untrue book-keeping. It can matter little whether one writes many untrue entries through ignorance, or mistake, or with design. Habitual or frequent inaccuracy though not dishonest, should shake the credit of the book, and of the keeper of it.

Reputation of the Book

The books may acquire a reputation for inaccuracy. "When they have acquired a general reputation for inaccuracy—when the shopkeeper has through fraud or carelessness made false entries, or omitted true ones, so frequently as to destroy the confidence of his customers in both himself and his books, what reason," asks Woodward, J., "is there for insisting that a jury shall trust him? How can private entries which a whole community have learned to discredit promote the ends of justice? They are no more worthy of the confidence of a court and jury than a witness whose reputation for truth and veracity is impeached?" This reputation of the book for inaccuracy is founded on the inaccuracy of many of the entries

[5]Barber v. Bull, 7 W. & S. 391.
[6]29 Pa. 257.

against many persons in the community. "Like the testimony of living witnesses," said Buffington, P. J., "they may by degrees, and from the discovery of many customers, of various and general inaccuracies, acquire such a reputation for incorrectness as to render them quite unworthy of credit."[7] One who uses a book of original entries offers for attack its reputation for accuracy.[8]

Showing Particular Errors in Accounts With Others

It is said that not only may the character of the keeper of the book be attacked, but it may be shown that the books are "notoriously unworthy of confidence," and this may be established "by particular acts of irregularity by the plaintiff in keeping them." The books, said the court "might be discredited by showing them to be notoriously unworthy of confidence, which could not be done, however, without descending to particulars."[9] This seems to teach that particular charges against A, or B, or C, may be proven to be inaccurate, in order to shake the credit of the entries in the book against X. "When," says Woodward, J., "a book of original entries is offered in evidence, supported by the oath of the party, the court examines it to see if it appears *prima facie* to be what it purports to be. If there are erasures and interlineations, and false or impossible dates, touching points that are material, or if for any reason it clearly appears not to be a legal book of entries, the court may reject it as incompetent * * * If this does not clearly appear, it is to be submitted to the jury to judge of, and then it is competent for the adverse party to show its general character by pointing to charges and entries affecting other parties, and by calling witnesses to prove such entries false and fraudulent."[10] Hanna, J.,

[7]Weamer v. Juart, 29 Pa. 257.
[8]White's Estate, 11 Phila. 100.
[9]Barber v. Bull, 7 W. & S. 391; White's Estate, 11 Phila. 100.
[10]Funk v. Ely, 45 Pa. 444; Fulton's Estate, 178 Pa. 78.

observes[11] that "the evidence as to the character of books of original entry should be confined to their *general* character, unless specific instances of unfair or false and dishonest entries are proposed to be proved." But the meaning of this sentence is problematical. What is "general character?"[12] It is not "general" in the sense in which the character of an individual is general; that is, not limited to a particular virtue or vice, but to virtues and vices indiscriminately. The only quality of the books in contemplation, is that of accuracy, truthfulness, honesty. There might be room to suspect that the judge meant by general character, to refer to a characterization of the book as a unit, as inaccurate, because of the large ratio of inaccuracies in the entire number of entries in it, as contrasted with the exposure of inaccuracies in a considerable number of entries, but for his own definition. For "general character," he gives as an equivalent "or common reputation in the community or neighborhood, and among persons having dealings with him where character is sought to be impeached." After having said that "particular instances of irregularity and false charges may be proved," he adds, mystifyingly, "The individual opinions and *personal knowledge* of the witnesses derived from private transactions (all the transactions are private transactions) are always to be excluded." How then is the falseness of the particular "false charges" to be proved?

Judge Hanna remarks that "the testimony of witnesses is not to be confined to the single book admitted in evidence, for that may contain only the charges in dispute, but may extend over a period of years, and through a series of books of accounts." He proceeds to say that "the

[11]White's Estate, 11 Phila. 100.

[12]The expression is used by Woodward, J., who remarks "general character is formed by numerous particulars." Hanna, J., also says "Particular instances of irregularity and false charges may be proved to discredit the books, and show them to be unreliable."

investigation should be restricted to a reasonable limit; confined to general reputation of the books for accuracy and honest dealing, at or about the time, or within a reasonable period before or subsequent to the time the alleged indebtedness was contracted." Does this mean that the reputation must exist during the period named, or that the entries during the period named must be the subject of the reputation? Suppose the effort to collect the debts charged are not made for a year or two after the close of the series of charges, and the knowledge of persons charged of the nature of these charges does not exist until then. Is the reputation then engendered not to be conidered?

Scope of Time During Which Entries May Be Investigated

While entries against other persons may be investigated, in a suit on a book of original entries against X, Woodward, J., remarks "That this investigation may not run into excessive departure from the issue on trial, the court should limit it to the time ,or near the time covered by the account in suit, and should suffer no more examination of collateral cases than would bear directly on the general character of the book." Accounts against others than X, which are running contemporaneously with the account against X, may be examined with a view to discovering inaccuracies that would discredit the book even as respects the account against X, but parts of accounts which run before the commencement, or after the close of the account against X are not to be considered, to avoid an "excessive departure from the issue on trial."[13]

Visible Features of the Record

Certain characteristics of the account may be visible to an inspection, which will justify the rejection by the court of the account. "If there are erasures," says Wood-

[13]Funk v. Ely, 45 Pa. 444.

ward, J., "and interlineations, and false or impossible dates, touching points that are material, or if for any reason, it clearly appears not to be a legal book of entries, the court may reject it as incompetent. Even if the court has admitted the book, if it exhibits, in respect to customers generally, illegal dates, as on Sunday, or impossible dates as 31st of June or 30th February, or altered dates, or earlier dates after those that are later, or any other such condemning features, they are evidence for the jury upon the general character of the book. The jury may form some opinion from such examination, how far it is entitled to weight in the scales which they are holding. Whilst they should make all due allowances for mistakes, for ignorance and unskilfulness in book-keeping, and for peculiarities in the plaintiff's business, they should insist on the general honesty and accuracy of the book, made in secret by one party against the other, and now offered as a guide to the conscience of the jury."[14]

Funk v. Ely

It may be profitable to review with some detail this case. John and Solomon Ely had been partners prior to the spring of 1861, in the meat business. With them Funk had dealt. The plaintiffs defended largely on their book of original entries. The defendant attempted to show that in a suit against M., the Elys had used as their book of original entries, a different book from that used in the present suit. Why this evidence was rejected does not appear. The supreme court seems not to find error in the rejection. The trial court rejected evidence that the Elys after dissolving partnership left the books in the hands of one of the partners, Solomon, for collection. He has submitted the books to the customers of the firm for settlement of their accounts, and thereby they have acquired a "no-

[14]Funk v. Ely, 45 Pa. 444.

toriously bad reputation for honesty and accuracy among all the *customers* of the firm, and throughout the entire community." It allowed only evidence of the general character of the books, and of Solomon Ely, the book-keeper, to be given in connection with the character of the books, until the time the present suit was instituted. Nothing in the opinion of the Supreme Court indicates dissatisfaction with this refusal to admit evidence of the reputation of the book for numerous inaccuracies. In White's Estate,[15] the auditor found the general reputation of the claimant's book for accuracy, and his character (reputation?) for truth and veracity, to be bad, and therefore, with the approval of the court, disregarded the book of original entries.

The court rejected the defendant's evidence as to the character of Solomon Ely, the book-keeper, and his books for honesty and correctness, both of general reputation, and of particular facts relative to the accounts contained in the books, such as known false entries, entries on the Sabbath day, and upon impossible dates, and other inaccuracies. The court allowed defendant to prove the general character of the books for accuracy and honesty, and, in connection with them, the general character of Solomon Ely for honesty and truth. The court refused to allow any evidence to be given in reference to any other accounts than the one against the defendant. The Supreme Court says that Solomon Ely in swearing to the book of entries, put his general character for truth and veracity in evidence. The general character of the book for honesty and accuracy was also put in evidence. But what the "general character" of the book was in the

[15]11 Phila. 100. Buffington, J., allowed proof of the general bad character of the book for accuracy in the neighborhood to be given. Books may, he says, "acquire such a reputation for incorrectness as to render them quite unworthy of credit." A judgment for the defendant was affirmed. Weamer v. Juart, 29 Pa. 257.

thought of Woodward, J., does not clearly appear. Perhaps it was the character for both, of entries not specifically against the defendant, but against other customers. It was hardly general reputation, i. e. reputation pervading a considerable part of the community. It was error to confine the inquiry to the accuracy of the charges against the defendant. It was error to exclude the entries against others than the defendant, on impossible dates, on the Sabbath day, etc.

The court refused to affirm a point of the defendant, that if the book produced at the trial as the book of original entries was purchased in 1860, after the transactions with the defendant, the book cannot be a book of original entries. The court found no evidence that the book had been bought in 1860.

The court stated to the jury that the defendant had had every opportunity to impeach the "general character of the books" and of Solomon Ely in connection with them, but had offered no evidence on that subject.

The court in its charge named several witnesses who, for the defendant, had testified to another book than the one used by the plaintiffs in the trial. One of them said a charge originally of 42 cents had become, when he saw it a second time, a charge of $2.00. The court remarks that there was no evidence that the account sued on, was embraced in that book, and hence the evidence is apparently not very pertinent. He directs the jury however, to give the evidence the weight which in their opinion it deserves. The judgment for the plaintiff was reversed.

Barber v. Bull[16]

This was an action of debt on a book account. The plaintiff testified that books were books of original entries, and they were put in evidence. Defendant proved

[16]7 W. & S. 391.

that plaintiff was unworthy of credit, and that his books were "notoriously unworthy of confidence." He established this unworthiness by particular acts of irregularity in keeping the books. The judgment for the defendant was affirmed.

Crouse v. Miller[17]

Defendant proved as a set-off, cash paid, and goods sold to the plaintiff. His books of original entries had been kept by Charles B. Crouse who was absent in another state. His hand-writing was proved. The court allowed a witness for the plaintiff to state what the character of Crouse, for honesty, generally, was. The judgment for the plaintiff was affirmed.

White's Estate[17]

A dentist presented a claim against the estate of White in the Orphans' Court. The auditor admitted the dentist's book of original entries, but, finding the reputation of the dentist for truth and veracity to be bad, and the "general reputation of the book for accuracy to be bad," he disregarded the book and disallowed so much of the claim as depended on it. The action of the auditor was sustained by the court, which says that one who offers a book to sustain a claim "not only offers for attack and scrutiny his character for honesty, truth and veracity, as well as the reputation of his books for accuracy and upright dealing."

[17]10 S. & R. 155.
[18]11 Phila. 100.

MOOT COURT

HENDERSON'S ESTATE

Wills—Revocation of Codicil—Effect of Defective Execution of the Revoking Codicil

STATEMENT OF FACTS

John Henderson left a will, one bequest of which was "I give to my brother John, $10,000." He subsequently executed a codicil without any subscribing witnesses in which he said "The $10,000 I have given absolutely to John, I hereby give to him for the term of his natural life only, and after his death, I give it to the Good Samaratin Hospital."

The auditing judge has held the codicil void, and has awarded the $10,000 to John absolutely.

Lee, for plaintiff.

Lichtenstein, for defendant.

OPINION OF THE COURT

LAROSSA, J. The fundamental and cardinal rule in the interpretation of wills is that the intention of the testator, if not inconsistent with some established rule of law, or with public policy must govern. Waelpper's Appeal, 126 Pa. 572.

It is a rule of law that charitable or religious institutions must bring themselves within the purview of the act of 1855, in claiming bequests or devises.

The purpose of this act is plain, and indeed mandatory, and wants to make reasonably sure that testamentary gifts to religion or charity were the result of deliberate intent of the testator and were not coerced from him while in a weakened physical condition under the influence of the doubts and errors of impending death. Paxon's Estate, 221 Pa. 98.

It therefore follows that the residuary estate given to the hospital was void because the codicil which so provided for this estate was not executed as required by the act of April 26, 1855, P. L. 328, 1 Purd. 595.

But, the auditing judge has held the codicil void; this is clearly in error.

The provision in the codicil which created the life estate was a valid testamentary disposition of the property and vested in the life tenant. Anderson's Estate, 243 Pa. 34.

It is clear that the purpose of the testator was to provide for the legatee, John, during his life only.

The codicil clearly and unequivocally imparts the intention of the testator. He said: "The $10,000 I have given absolutely to John, I hereby give to him for the term of his natural life only, and, after his death, I give it to the Good Samaratin Hospital."

The life estate was not created for any illegal purpose, nor to carry out an illegal scheme—the testator simply wished and willed, like all philanthropists, that his money should serve successive roles. The last role in which this money was to play is prohibited for the reasons heretofore given and therefore required disposition other than as planned by its donor.

The codicil being incompatible with the original bequest, revoked, by necessary implication of law, so much of the will as originally provided for the bequest to John, and since a portion of the codicil is inoperative, it follows that the testator had died intestate insofar as concerns that portion of the codicil that has failed, and the fund must be distributed according to the intestate laws of the state. Anderson's Estate, supra; Hock's Estate, 154 Pa. 422.

Decree accordingly.

OPINION OF THE SUPREME COURT

In 12 D. L. R. 187 it is said: "While a * * * codicil which is not executed as the law requires for wills, generally, cannot even revoke an earlier will, if complying with the general law of wills, it is vulnerable merely because, giving property for charitable or religious uses, it does not observe the requirements of the act of 1855, it will revoke the earlier will though its provisions for charities cannot be carried out."

This principle was applied in Anderson's Est., 243 Pa. 34, where it was held that "a codicil cutting down an absolute estate given in a prior codicil, to a life estate will revoke the prior codicil, although by reason of the defective execution of the later codicil a gift over to a charitable use contained therein cannot take effect."

The decision of the learned below is justified by these authorities and by the decisions in Teacles Appeal, 153 Pa. 219; Appeal of Lutheran Church, 113 Pa. 32.

WILSON v. RAILWAY CO.

Common Carriers—Degree of Care Required in Transporting a Passenger Known To Be Intoxicated

STATEMENT OF FACTS

Wilson, while on the car of the defendant, became more and more intoxicated from liquor drunk before boarding the car. At a certain point he signalled to be allowed to get off. The car was stopped at a place where had he been sober he could have alighted with safety. The conductor, though aware of his condition, did not assist him until he reached the road. He fell and seriously hurt himself. The court told the jury that a passenger could not so enfeeble himself by his own indulgence and in consequence, impose the duty of greater care on a conductor than that which he owed to persons who were sober. It also stated that becoming drunk and so superinducing the injury was contributory negligence. Verdict for defendant. Motion for a new trial.

Holderbaum, for plaintiff.

Kane, for defendant.

OPINION OF THE COURT

HENDRICKS, J. The first instruction of the court to which the plaintiff excepts is that a passenger could not by his own indulgence so enfeeble himself and, as a consequence, impose upon the conductor the duty of greater care than that which he owed to persons who were sober.

The carrier is bound to guard the passenger from every danger which extreme vigilance can prevent. Although carriers of passengers do not warrant absolute safety, they are bound to exercise the utmost degree of diligence and care. The slightest neglect resulting in hurt or loss, against which human foresight and prudence may guard renders carriers of passengers liable. Smedley v. Hesterville, etc., R. R., 184 Pa. 620; Meier v. Pa. R. R., 64 Pa. 225; People's Passenger Rwy. v. Weiller, 17 W. N. C. 306; Sullivan v. P. and R .R., 30 Pa. 234; Laing v. Calder, 9 Pa. 479.

A carrier is not bound to accept as a passenger without an attendant, one who, because of physical or mental disability, is unable to take care of himself, but having so accepted such person, his inability to care for himself rendering special care and assistance necessary, the carrier will be held responsible if such care

and assistance are not offered. 5 A. and E. Encyc., 538. The degree of care to be exercised in such a case is that which is reasonable for the safety of the passenger in view of his mental and physical condition. 5 A. and E. Encyc.. 538. This rule was held to apply to intoxicated persons in Wheeler v. Grand Trunk Rwy. Co., 50 Atl. 103; Fisher v. W. Va. and Pittsburg R. R. Co., 23 L. R. A. 758.

It was further held in the former case that if the plaintiff had not been a drunken passenger on the car, but a drunken trespasser on the track, it would not be denied that the duty would have arisen to take such precautions as were proper to avoid an accident. Surely a drunken passenger is entitled to not less care and precaution against injury. Where a carrier accepts an intoxicated person as a passenger, who is incapable of caring for or preventing injury to himself, knowing him to be in that condition or later becoming aware of the fact, without putting him off, and then fails to exercise such care as a reasonably prudent man would exercise under such circumstances to prevent him from injuring himself, the company is liable for the injuries occasioned.

This brings up the question whether reasonable care was used and we think this is a matter for the jury. Whether under the circumstances the care which the defendant owed to the plaintiff was such, that by its exercise the injury would have been prevented, is a matter for the jury alone. There is no absolute test fixed by law by which the measure of care required in a particular case can be determined. The only standard is to be found in the carefully considered, dispassionate judgment of the jury in view of all the circumstances of the case. Therefore, without taking up the matter further, we think the learned court erred in giving this instruction, as the question what exact amount of care the defendant company owed the plaintiff was for the jury to decide.

The second instruction excepted to was that getting drunk and so superintending the injury was contributory negligence.

The conductor did not assist the plaintiff in alighting until he reached the road. "The carrier is bound to exercise care in securing the safety of the passengers in boarding and alighting from its cars and the degree of care required in this duty is the highest care." 6 Cyc. 611. "In general there is no duty to assist a passenger in entering or alighting from the car, unless there is some unusual danger or difficulty, unless the passenger is to the knowledge of the servants of the carrier, infirm or under some

disability." 6 Cyc. 611. Therefore we do not doubt that the conductor's failure to assist the plaintiff was negligence.

If the defendants, with knowledge of the plaintiff's condition, in the performance of the duty owed by them, could have prevented the injury, they were bound to do so; and their breach of duty would be the cause of the injury. If the plaintiff could not have prevented the injury to himself, and the defendants could by the care the situation required of them, they are liable if they did not, although the plaintiff's inability arose from his prior negligence or intoxication. If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both of the parties is immaterial, except as it may be one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior misconduct. To support this we have Nashua Iron and Steel Co. v. Worcester and N. R., 62 N. H. 159; Coasting Co. v. Tolson. 139 U. S. 551; R. R. Co. v. Ives, 144 U. S. 408

If the negligence of the passenger is known to the servants of the carrier, and by the exercise of the degree of care required of carriers for the protection of their passengers, the injury likely to result from such negligence might have been avoided, then the carrier is liable for the fault of his servant in not avoiding such injury, such fault being deemed the proximate cause thereof, while the negligence of the passenger becomes the remote cause. 6 Cyc. 641.

While drunkenness will not excuse exercise of due care on the plaintiff's part, still if plaintiff was so drunk that he was not properly able to take care of himself, and defendants knew of his condition in time to prevent the accident and did not use due care to prevent it, they were in fault. In this case where defendants were not obliged to accept plaintiff as a passenger in the condition he was, still, if they did accept him when they knew he was so far under the influence of liquor, or if they permitted him to remain on the car after they became aware of his condition, it was their duty to use due care to prevent injury.

Where defendant's answer is that the plaintiff's incapacity was caused by his voluntary intoxication, if it were established that the plaintiff's incapacity and irresponsibility were known to the defendants, the cause of his intoxication is entirely immaterial. Intoxication will not of itself prevent a recovery. Maguire v. R. R. Co., 115 Mass. 239; Kean v. R. R. Co., 61 Md. 154; R. R. Co. v. Cooper, 120 Ind. 469.

Therefore we think that when the conductor of the defendant company failed to assist the plaintiff in alighting he failed to exercise the degree of care required of carriers for the protection of their passengers, and since by the exercise of such care, the injury likely to result from the known intoxication of the plaintiff might have been avoided, but was not, on account of said failure of the conductor in his duty, that became the proximate cause of the injury and the defense of contributory negligence can not be set up.

However, we need not go further, as it is clearly the province of the jury to decide as to the proximate and remote causes of an injury, and as to contributory negligence. The plaintiff is entitled to every fact and every inference of fact which might have been found by the jury or drawn by them from the testimony before them. If there is a reasonable doubt as to the facts or the inferences to be drawn from them ,it is the province of the jury to determine it. Lewis v. Wood, 247 Pa. 545; D. L. and W. R. R. Co. v. Jener, 128 Pa. 308.

In Pennsylvania the rule has long been established that the question as to whether or not the intoxication of the plaintiff was the proximate cause of the injury is a question for the jury. Munley v. Hull, 3 Lack. J. 277; Hershey v. Mulcreek Twp., 9 Atl. 452.

Therefore in view of the cited cases and the conclusions drawn from them, we think that both assignments or error should be sustained and a venire facias de novo should be granted.

OPINION OF THE SUPERIOR COURT

Further discussion of this case is rendered unnecessary by the able opinion of the learned court below. Cf. Warren v. Railway Co., 243 Pa. 15.

Affirmed.

BALLOCK v. HENGST

Sales—Interpretation of Contract, Whether Divisible or Indivisible

STATEMENT OF FACTS

For a consideration, i. e., the surrender of a certain right by Hengst, Ballock agreed to supply Hengst during July with 100 barrels of flour, and during August with 140 barrels, at $9 per barrel. Ballock supplied in July 60 barrels and none in August. Hengst,

though he received the flour in July and sold it for $11 per barrel, declined to pay for it, contending the contract was entire, and would not have been entered into for any less than 240 barrels. The court took this view. Verdict for the defendant.

Burd, for plaintiff.

Gangewer, for defendant.

OPINION OF THE COURT

AYLESWORTH, J. The first question arising from these facts is whether the contract entered into by Ballock and Hengst is entire or divisible. A contract is entire when by its terms, nature, and purposes, it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent.

A divisible contract is one in its nature and purposes susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be.

The Sales Act of 1915, Sec. 76, P. L. 564, defines a divisible contract as follows: "Divisible contract to sell or sale means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation."

But these definitions do not decide the point. The question as to whether a contract is entire or divisible has arisen in a variety of ways, and it seems that the decisions of the courts as to how such contracts should be construed in particular cases have frequently been made to depend somewhat upon the purpose for which the question was invoked.

The well settled rule of construction, however, is that the intention of the parties must govern, Shinn v. Bodine, 60 Pa. 182, and this must be ascertained by the ordinary rules of construction, considering not only the language of the contract, but also, in cases of uncertainty, the subject matter, the situation of the parties, and the circumstances surrounding the transaction. The question does not depend solely or necessarily upon the nature of the subject matter of the sale, Rigg v. Moore, 110 Pa. 236, its divisibility, Shinn v. Bodine, supra, or the multiplicity of the articles or items composing it, Rigg v. Moore, supra.

It is ordinarily presumed that the intention of the parties is expressed by the writing; that it contains the whole contract; and that a person means what his language, by its terms, and under the circumstances under which it is used, would be fairly understood to mean, and this presumption cannot be rebutted by proof that he intended something more or different, which he made no attempt to express, and which a person dealing with him neither understood nor had reason to understand.

When the language of the agreement is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement will be preferred to that which makes it an unusual, unfair or improbable contract. In the present case, Ballock agreed to supply Hengst during July with 100 barrels of flour and during August with 140 barrels. We think it a fair presumption that the parties intended to contract for the aggregate 240 barrels. But in arriving at the intention of the parties the nature of the subject matter is to be considered, and also the nature of the consideration.

Ordinarily a contract for the sale of goods by the pound, bushel, ton, etc., at so much per pound, bushel, or ton is considered divisible. For instance, a contract to sell 5000 tons of coal at $3 per ton is divisible, whereas a contract to sell 5000 tons of coal for $15,000 is entire. But this latter case does not seem to be true under the definition of divisible contract given in the Sales Act (quoted above), which says it is divisible if the price of any portion can be ascertained by computation. If the subject matter of the sale is regarded by the parties as being in the nature of one entire thing, or the sale is of a specified quantity or amount, the contract is entire, although such goods consist of separate lots, parcels, or packages, and are priced separately, or according to certain standards of weight or measurement, Shinn v. Bodine, supra, and even the fact that different prices per pound are fixed by the contract will not necessarily render the contract divisible.

In some cases it has been held that the character of a contract of sale as entire or divisible should be determined chiefly by the character of the consideration. Rigg v. Moore, supra. And the rule has been adopted that where the sale is for a gross price, that is, where the consideration is entire, the contract is entire. If the contract is for the sale of several distinct things, but all for one consideration, it is entire. Roberts v. Beatty, 2 P. and W. 63, 21 Am. Dec. 418; The Lucesco Oil Co. v. Brewer et al, 66 Pa. 331.

The subsidiary provisions as to delivery of stated quantities in different months, do not split up the contract into as many contracts as there shall be deliveries of so many distinct quantities of flour. Mersey Steel Co. v. Naylor, 9 App. Cas. 434, Eng. The mere fact that the articles sold are to be delivered in instalments does not of itself render divisible a contract otherwise entire, Norrington v. Wright, 115 U. S. 188. From all this we can come to no other conclusion than that this contract is entire.

Now then having seen that the contract under consideration is entire, what will be the effect of the delivery of a smaller quantity than that stipulated in the agreement? Under Sec. 44 of the Uniform Sales Act, a defect in quantity is a breach going to the essence, and the buyer, except under special circumstances of custom or contract, cannot be compelled to accept a quantity different from that for which he bargained. Where the seller is under a contract to deliver a specific quantity of goods and tenders a smaller quantity, the buyer may reject the tender. Norrington v. Wright, supra. The buyer may, however, accept the offer though defective. But in case the seller's obligation is either by its terms or by the buyer's permission performable in instalments it may happen that the buyer, not supposing the seller is going to be guilty of a breach of contract, accepts one or more instalments, assuming that the rest are to follow. If the contract is divisible there is no doubt that the seller can recover the price of the portion delivered. But if the contract is entire, the price is not due until full performance. If the buyer knows no more is to be delivered, then there is no difficulty in finding a real contract to pay for them, since the partial delivery was in effect a new offer. But if the deficient quantity of the goods were delivered under such circumstances that the buyer was not aware that full delivery would not be made, no new contract can be said to have been agreed to by the buyer. Here accordingly, if the seller recovers payment for what he has furnished, it must be on principles of quasi-contract. It is true that it has often been laid down that a contract will not be implied by the law in favor of one who is in default under an express contract, but the injustice of allowing the buyer to retain the benefit of goods without paying for them is so clear that even in England where quasi-contract rights are generally most strictly limited, recovery has been allowed, Oxendale v. Wetherell, 9 R. and C., 386, and the weight of authority in this country strongly supports this view. Shaw v. Badger, 12 S. & R. 275; Richards v. Shaw, 67 Ill. 222; Hedden v. Roberts, 134 Mass. 38; Clark v. Moore, 3 Mich. 55; Holden Mill v. Westervelt, 67 Me. 446.

But in New York and a few other states the seller is denied relief. The New York rule is illustrated by the case of Catlin v. Tobias, 26 N. Y. 217, 84 Am. Dec. 183, holding that where goods are received and used by the vendee under a contract for the delivery of specified quantities in each of three successive months, the quantity delivered being less than that required by the contract, such breach is a bar to an action by the vendor for the price of goods delivered. The vendee under such a contract has a right to expend the goods delivered, as required in his business, without waiting for the expiration of the month to see whether the vendor will fully perform his contract,' and such use is no waiver of his defense in case of the vendor's breach of contract.

The doctrine of this case is followed in Pennsylvania by the case of Producers Coke Co. v. Hillman, 243 Pa. 313, the facts of which bear a remarkable similarity to those in the present case. There the defendants gave up their rights under an earlier contract in consideration of a new agreement by which plaintiff agreed to supply the defendants with 3,680 tons of coke at $2.379 per ton during the month of July, and 2,124 tons at $2.345 per ton for the months of August, September, October, November, and December. The plaintiff had delivered during July 844½ tons less than the amount called for, and had failed to deliver any coke whatever during the month of September. Suit was brought to recover for coke delivered during July. It was held that the contract was entire and that there could be no recovery by the plaintiff for partial performance.

This case of Producers Coke Co. v. Hillman, 243 Pa. 313, is in conflict with the case of Shaw v. Badger, 12 S. & R. 275, where the court permitted a recovery for partial performance, but allowed the defendants a set-off of damages founded upon the non-delivery of the other portion contracted for. Shaw v. Badger was followed and approved in Hubler v. Tanney, 5 Watts 51. The decision is in accord with the weight of authority in this country.

The measure of damages in such an action is not necessarily the contract price, even if the contract fixes a price by number, weight or measure. If the buyer retained the goods, having it in his power to redeliver them after he knew that the seller was going to make default in delivering the whole amount, it seems just that the buyer should pay the contract price. The buyer, however, may in good faith have dealt with the goods in such a way as to make it impossible for him to return them, and yet the value of the portion received may not be so large a proportion of the total price as the goods are of the total amount of goods which should have been delivered. As the buyer's obligation is imposed by law, the

extent of it should be restricted to the benefit which the defendant has received. The seller, being a wrongdoer in failing to deliver the whole amount, can certainly claim no more than this. In the present case, the price at which the defendant sold the flour represents the fair value of it to him.

The doctrine set forth in Shaw v. Badger has been embodied in our new Sales Act which took effect Jan. 1, 1916. See Sec. 44 of the Act, P. L. 555, and Williston on Sales, pp. 786-790.

Sec. 44 provides: "Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered knowing that the seller is not going to perform the contract in full, he must pay for them at the contract price. If, however, the buyer shall not be liable for more than the fair value to him that the seller is not going to perform his contract in full the buyer shall not be liable for more than the fair value to him of the goods so delivered."

The defences and remedies of the buyer are provided in Sec. 69, P. L. 562. The first method suggested is applicable to the present case. "Where there is a breach of warranty by the seller, the buyer may, at his election (a) accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price."

So we cannot follow the decision in Producers Coke Co. v. Hillman, 243 Pa. 313, which was decided in 1914 before the passage of the Uniform Sales Act in this State.

In summing up we find that the contract in the present case was entire; that under Sec. 44 the plaintiff is entitled to recover; that the measure of damages is the fair value of the goods to the buyer; that the buyer can set off the damages, although unliquidated, which he has sustained by reason of the breach of the contract; that the amount of damages and set-off is a question for the jury.

We therefore decree that the judgment of the court below be reversed and that a venire facias de novo be awarded.

Judgment reversed with v. f. d. n.

OPINION OF THE SUPERIOR COURT

For a consideration Ballock bound himself to deliver 240 barrels of flour to Hengst at $9 per barrel. He has delivered 60 barrels, and no more. He wants to recover $540, for the barrels delivered.

Had Hengst known when he accepted and retained the 60 barrels, that Ballock was "not going to perform the contract in full," he would be obliged to pay for the barrels received at the contract price. §44, Act relating to the sale of goods, P. L. 1915 p. 543. It does not appear that he thus knew. We assume then, that he did not. This duty therefore does not arise.

The 44th section proceeds to say that if the buyer had used or disposed of the portion of the goods delivered "before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received."

The act does not say that he shall be liable for "the fair value," etc., but merely that he shall not be liable for more than that value. If any distinct intention existed, for the adoption of this negative phrase, it was probably to provide for the recouping of damages for the non-completion of performance by the vendor.

As the vendee sold the 60 barrels for $2 per barrel more than he paid, the price named in the contract, $9, is probably the "fair value to him." But the non-fulfilment of the contract, in refusing to deliver the remaining 180 barrels, has probably caused a loss to Hengst. This loss he may show, and set it off against the $540. The able opinion of the court below well sustains its judgment.

Affirmed.

COLLINS v. TRUST CO.

Pledge By Agent—Right of Recovery by Owner of Pledged Property Against the Pledgee

STATEMENT OF FACTS

Mrs. Collins owning stock in a shoe company executed to Hobson, a broker, a blank power of attorney to assign the stock, Hobson undertaking to sell the stock for her and account for the proceeds. Hobson, pretending to own it, obtained a loan of $2,000 upon it from the Trust Co., pledging it as security with the power to sell on notice. The notice was given and sale made for just enough to pay the loan to the Trust Co. When the Trust Co. obtained the pledge it had no knowledge of Mrs. Collins' ownership, but acquired such knowledge before it made the sale. The day following the sale the Trust Co. sold the stock at an advance of

$250. This is a bill to compel the Trust Co. to pay (a) the whole of the money obtained by the sale by it, or (b) so much thereof as exceeds the debt for which Hobson pledged it.

York, for the plaintiff.

Bourquin, for the defendant.

OPINION OF THE COURT

K. VAUGHN, J. We will discuss the case from the two questions presented by the bill (1) whether the plaintiff is entitled to the amount of the pledge; (2) whether the plaintiff is entitled to the $250 excess, realized by the Trust Co. in its resale of the stock.

(1). Mrs. Collins executed to her broker a blank power to assign without any qualification. It is now well established in Pennsylvania that where the true owner of property holds out another or allows him to appear as the owner of, or having full power of disposition over, that property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights do not in such cases depend upon the actual title or authority of the party with whom they deal directly. but are derived from the act of the real owner. This rule is more often stated, that where one of two parties must suffer from the wrongful act of a third person, the party who clothes that third person with power to perpetrate the wrong must suffer rather than the innocent party who is deceived and imposed upon. Penna. R. Co.'s Appeal, 86 Pa. 80; Burton's Appeal, 93 Pa. 214; Shattuck v. Am. Cement Co., 205 Pa. 197; Woods' Appeal, 92 Pa. 379, 16 L. R. A. (N. S.) 727.

When the stock was pledged the Trust Co. believed that the ownership was in Hobson, the broker. It is clear that the defendant is not liable for the amount of the pledge (viz. the $2,000). This is abundantly supported by Burton's Appeal, and Shattuck v. American Cement Co., supra. In the former the owner of stock left his certificates with a broker accompanied with a blank power of attorney to sell and transfer the same. The broker pledged them for his own debt to one who had no knowledge of the real ownership, and the court held that such real owner was estopped from setting up his ownership against the innocent pledgee. Again, in the latter case, the owner of stock gave to his brokers certificates of stock owned by him, but standing in the name of other parties, with blank assignments and power to make transfers endorsed by the registered owners. The brokers betrayed the confidence imposed in them, and the court decided that the owner

of the stock must suffer rather than the innocent third party.

In the cases cited by the plaintiff which hold the opposite to the proposition discussed above the third party had either actual knowledge of the real ownership or there were circumstances such as to put him on inquiry. The Trust Co. in the present case did not obtain knowledge until after the pledge had been made. Mrs. Collins was bound by the act of her broker and is not entitled to the amount of the pledge.

(2). The second question relates to whom the $250 excess belongs. This second sale was made after the Trust Co. had realized the full sum given by them to Hobson, and after they obtained knowledge of Mrs. Collin's ownership. While it is clear that the defendant should not be compelled to suffer because of the wrong of the broker, it is equally clear that it should not be permitted to profit from that wrong. What it realized above its own debt should go to the plaintiff to repair her in a way for the loss she has suffered. If the owner of property has conferred the indicia of ownership upon the pledgor he can recover only the proceeds in excess of the amount for which it was pledged. 31 Cyc. 843;

Judgment is given accordingly for the plaintiff in the sum of $250.

OPINION OF THE SUPERIOR COURT

The defendant loaned $2000 on the security of the stocks, believing and having justification given by Mrs. Collins, its owner, for believing, that it belonged to Hobson, the broker, to whom the $2000 were lent. The Trust Company had a right then, to make a sale of the stocks, in order to secure repayment of the loan. Notice from Mrs. Collins, that the stock was hers, and not Hobson's was too late. It could not divest the Trust Company's right to sell it. This the learned court below concedes and decides.

If the sale had been to a stranger, even with notice of the circumstances, he would have become the absolute owner of the stocks. He would have been under no duty to account for so much of its price as exceeded the $2000.

Under the circumstances, the purchase by the Trust Company, the pledgee, clothed it with the right which a stranger purchasing it would have had. The learned court below thinks that, since the Company was apprised of Mrs. Collin's interest before it made the sale, it was under a duty to be satisfied with the recovery of the $2000. So, probably, it should. So thought Stewart, J., in Colonial Trust Co. v. Central Trust Co., 243 Pa. 268, but the majority of

the court thought otherwise, or at least decide as if they did. In this we must follow the multitude to do evil.

Judgment reversed.

HAMMOND v. ICE MFG. CO.

Action For Damages For Injuries Sustained in Foreign Jurisdiction—Applicability of the Law of the Foreign State

STATEMENT OF FACTS

Hammond, while employed by the defendant, an Ontario Canadian Corporation, operating in Canada, was injured by the negligence of a fellow employee, concurring in the unsafeness of the place where the plaintiff was appointed to work. The law of Canada exempts the employer from liability for the negligence of a fellow employee, but imposes on the employer the unconditional duty to furnish a safe place to work. The trial court held: (a) the law of Ontario regulates the liability for an accident happening there; (b) an action can be maintained here for an injury caused there; (c) the fact that the accident resulted from the combined operation of the fellow-employee's negligence, and that of the employer, does not preclude liability by the latter.

Puderbaugh, for plaintiff.

Sheedy, for defendant.

OPINION OF THE COURT

PUHAK, J. With us foreign defendants may be sued. Wharton on International Law. p. 738 * * * "If a defendant can be summoned in this the jurisdiction, it is no bar to the action that he is an alien, or that the cause of action arose abroad;" and in §707 —in discussing to what extent this principle is pushed in certain cases—he writes: "In other respects, however, the practise of taking jurisdiction in all transitory suits in which the defendant is summoned in this the jurisdiction, is too deeply stated to be now shaken."

This case coming up on appeal we must presume that defendant was properly summoned. The Pennsylvania Constitutional provision as to damages for negligence, art 3, sec 21: "No act of the general assembly shall limit the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in

case of death from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such action shall be prosecuted. No act shall prescribe any limitation of time within which suits may be brought against corporations for injustice to persons or property, or for other causes, different from those fixed by general laws regulating action, or natural persons, and such acts now existing are avoided."

The act of April 1, 1851, P. L. 674, prescribes who shall prosecute such actions after the plaintiff's death; the act of April 26, 1855, prescribes for whose benefit an action shall be prosecuted after the death of the person injured; the act of June 10, 1907, P. L. 523, 6 Purdon 7013, sec. 2, provides that "In all actions brought to recover from an employer for injury by his employee, the negligence of a fellow servant of the employee shall not be a defense, when the injury was caused or contributed to by any of the following causes; etc."

But the act of 1915 (Workmen's Compensation Act of 1915) puts the workman in a better condition so far as the negligence of his co-workman affected him; but so far as we are concerned it is sufficient to note that it is a far more progressive piece of legislation than the Canadian Acts of this kind. However, this does not affect the case at bar.

The general rule is, as to personal torts which give a right of action at common law, that the action may be brought wherever the wrongdoer may be found, and jurisdiction ex contractu, their transitory character, and the jurisdiction of the courts that entertain them are the same whether the right be given by statute or common law. The statute of another state has no extra territorial force, but rights under it will always, in comity, be enforced if not against the policy of the laws of the forum. In such case the law of the place where the right was acquired or liability was incurred will govern as to the right of action, while all that pertains to remedy will be controlled by the law of the state where the action is brought. Knight v. R. R. Co., 108 Pa. 250. As a general rule neither citizenship nor residence is requisite to entitle a person to bring suit in Pennsylvania.

If a defendant were not liable to answer in a civil action in any state where he may be found he could easily evade service of process.

In our state the cases hold that our acts have extra territorial force. Patton v. Ry. Co., 96 Pa. 169; Knight v. R. R. Co., 108 Pa. 250; Usher v. R. R. Co., 126 Pa. 206; Derr v. R. R. Co., 158 Pa. 365.

An action may be maintained in the state against a foreign corporation to recover damages in an action "ex delicto" for negligence causing death in another state, where a statute of such state is similar to the Pennsylvania statute authorizing such an action. Knight v. R. R. Co., 108 Pa. 250.

In Clark v. Best Mfg. Co., 243 Pa. 353, we find a case practically in point, the only difference being in the fact that the corporation was a domestic corporation. The action was trespass to recover damages for personal injuries. It appeared that plaintiff had been superintendent in fitting pipes, running through a concrete wall from an engine room into a tunnel.Plaintiff having been directed by the superintendent to get into the tunnel, passed through a pipe, which had been insecurely placed by defendant's employees. While returning to the engine room at the direction of the superintendent, the plaintiff attempted again to pass through the pipe, when the section became overbalanced and fell several feet to the floor of the tunnel, crushing and injuring him. It appeared that access to that portion of the tunnel might have been had by a longer and less convenient way which was somewhat obstructed. The defendant company had had nothing to do with laying the concrete wall. The trial judge charged the jury that by the law of Ontario, where the accident occurred, if they found that the injury resulted from the superintendent's negligence in supervising and directing the work, there could be no recovery unless the defendant had failed to delegate to the superintendent the duty of warning or instructing the employees against a reasonably safe place for its employees in which to work. The jury found a verdict for plaintiff upon which judgment was entered, because of the nonprovision of a safe place to work. In this case both parties conceded that the liability of the defendant must be determined by the law of Ontario, where the accident occurred. So the case is a very simple one. The only question in the case is then, was the jury right in determining that the employer failed to furnish a safe place to work? This was within the jury's province, and from the facts submitted to them, we think, they were justified in determining the point the way they did.

The trial court committed no error in their instructing of the jury in the manner which they did.

Affirmed.

OPINION OF THE SUPERIOR COURT

The first instruction of the trial court was correct. It is a general principle of the conflict of laws that the lex loci delicti

governs the right of an injured party to sue for a tort, the liability of the perpetrator and the defenses which he may plead. This rule has been applied in many cases where the liability of the defendant depended upon his responsibility for the negligence of a fellow servant of the plaintiff and his duty to furnish the plaintiff a safe place in which to work. Minor on the Conflict of Laws, Sec. 197; Clark v. Manufacturing Co., 243 Pa. 353; Wharton on the Conflict of Laws, 1101.

The second instruction was correct. The modern tendency is to regard actions for torts as of a transitory nature, not confined to the place where the tort occurs, and to support an action for a foreign tort, if actionable by the law of the state where it is committed regardless of the law of the forum. The courts are inclined to be very liberal in sustaining such actions. Minor on Conflict of Laws, sec. 196; Usher v. Railroad, 106 Pa. 206; Wharton on the Conflict of Laws 1093. An action similar to that in the present case was allowed in Clark v. Manufacturing Co., 243 Pa. 353.

The third instruction was correct. The law having imposed upon the master the duty of furnishing a safe place in which the servant might work, his failure to provide such a place was a legal fault or negligence. It is well settled that a master is liable for an injury to a servant which is caused by the concurring negligence of the master and a fellow servant. 66 Cyc. 1302; Clark v. Mfg. Co., 243 Pa. 353. In Kaiser v. Flaccus, 138 Pa. 332, it is said, "The concurring negligence of a fellow servant with that of the master will not relieve the master of liability."

Judgment affirmed.

BOOK REVIEW

The Law of the Public School System of the United States, by Harvey Cortlandt Voorhees. Boston: Little, Brown, and Company. 1916. pp. LVII, 429.

The author of this book is not unknown to the legal profession. His earlier work on "The Law of Arrest" has been used by lawyers for many years and the recent publication of a new edition of this work has given the profession an opportunity to estimate the present capability of the author. The opinion formed by the profession after reading the earlier work is vindicated by the contents of the present volume.

It is the author's hope that his work will prove helpful to the members of the legal profession and to the "several hundred thousand school officers" in the various states. That this hope will be realized cannot be doubted. Probably the book will prove more useful to school officers who as a general rule, have not access to law libraries than it will to lawyers, but it usefulness to the latter will be very great.

Among the subjects of great present day interest which are treated are, compulsory education, religious garb of teachers, separate schools for colored children, secret societies, vaccination, etc.

The mechanical features of the book are excellent.